In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 620 Misc.

SAUL HENRY DAVIS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO FILE A PETITION FOR A COMMON LAW WRIT OF CERTIORARI AND PETITION FOR A COMMON LAW WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE MOTION

A petition for a common law writ of certiorari was filed in this Court in the above-entitled case on March 10, 1956. The judgment in the Court of Appeals was entered on January 23, 1956 (Pet. 17). Failure to file a petition for a writ of certiorari under 28 U.S.C. 1254(1) within the thirty-day time limit set by Rule 22(2) of this Court is stated by petitioner to have been caused by the

distance involved between his resilence in Minot, North Dakota, and that of his atorneys in St. Paul, Minnesota, and by illness (unspecified as to person or nature), so that it was impossible to consider fully whether to petition for certiorari in this case (Pet. 1-2). No reason is given for failure to seek an extension of time under Rule 22(2).

Petitioner invokes the jurisdiction of this Court under the "all writs" section of the Judicial Code, 28 U.S.C. 1651(a)[1] to settle the question of whether he was denied a fair trial because of improper cross-examination (Pet. 2). The traditional use of the common law writ of certiorari has been as an auxiliary process to supply imperfections in the record of a case already before the court, and, in cases of imperative necessity, as a means of correcting excesses of jurisdiction and furthering justice in other kindred ways. It may not be used as a substitute for the statutory writ of certiorari to correct mere errors committed in the exercise of a lawful jurisdiction. *United States* v. *Beatty*, 232 U. S. 463, 467-468; *United States* v. *Dickinson*, 213 U. S. 92, 102; *Whitney* v. *Dick*, 202 U. S. 132, 137-141; *In re Chetwood*, 165 U. S. 443, 461-462; *American Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, 379-380; Cf. *United States Alkali Assn.* v. *United States*, 325

[1] 28 U.S.C. 1651(a) provides:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

U. S. 196, 202-203; *Ex parte Vallandigham*, 1 Wall. 243, 249-251; *Ex parte Gordon*, 1 Black 503. And see Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, revised by Wolfson and Kurland (1951 ed.), Section 309, pp. 582-587.

Petitioner is not here attacking the jurisdiction of the courts below, and it is obvious that he seeks the common law writ of certiorari under 28 U.S.C. 1651(a) only as a substitute for the statutory writ of certiorari under 28 U.S.C. 1254(1) for which he failed to apply in time. If the time limits of the rules can be disregarded on as flimsy a basis as is here alleged, those time limits would have no real significance.

For these reasons, we respectfully submit that the motion for leave to file a petition for a common law writ of certiorari should be denied.[2]

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MARCH, 1956.

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[2] If the motion should be granted, we request an opportunity to file a brief in opposition to the petition.

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